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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

AARON LINDH,

Petitioner,

vs.

JAMES P. MURPHY, Warden,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Does new subdivision (d) of 28 U. S. C. § 2254, added by the Antiterrorism and Effective Death Penalty Act of 1996, apply to cases pending on the date of enactment?

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Ex parte Hawk, 321 U. S. 114, 88 L. Ed. 572, 64 S. Ct. 448 (1944) 8, 11

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Ex parte Vallandigham, 1 Wall. (68 U. S.) 243, 17 L. Ed. 589 (1864) 4

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Salinger v. Loisel, 265 U. S. 224, 68 L. Ed. 989, 44 S. Ct. 519 (1924) 5, 8

Sawyer v. Smith, 497 U. S. 227, 111 L. Ed. 2d 193, 110 S. Ct. 2822 (1990) 8, 11, 12

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1B J. Moore, Moore's Federal Practice (2d ed. 1996) 6

3 C. Wright, Federal Practice and Procedure (2d ed. 1982) 6

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141 Cong. Rec. (daily ed. June 6, 1995) 10, 18

141 Cong. Rec. (daily ed. June 7, 1995) 9, 10, 11, 13, 14, 15

142 Cong. Rec. (daily ed. Mar. 13, 1996) 9

142 Cong. Rec. (daily ed. Mar. 14, 1996) 9

Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum L. Rev. 527 (1947) 11

Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142 (1970) . . 29

Judicial Conference of the United States, Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Committee Report and Proposal (1989) 19, A-1, A-2

Liebman, Apocalypse Next Time: The Anachronistic Attack on Habeas Corpus/Direct Review Parity, 92 Colum. L. Rev. 1997 (1992) 4

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JAMES P. MURPHY, Warden,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the right of victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The present case involves a collateral attack on the final judgment of a state court based on arguments fully considered and fairly resolved there, within the limits in which reasonable, conscientious judges can differ. Such unwarranted attacks on final judgments are contrary to the rights of victims and society which CJLF was formed to protect.

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1. CJLF has written consent of both parties to file this brief.

SUMMARY OF FACTS AND CASE

The City-County Building in Madison, Wisconsin includes offices of both the city police and the county sheriff. On January 15, 1988, Aaron Lindh met with police officers. He then went out to his car, got a gun, walked into the sheriff's office, and shot three people, killing two of them. Joint Appendix ("J. A.") 89-90 (opinion of Wisconsin Supreme Court). A jury convicted Lindh of two counts of murder and one count of attempted murder, plus two weapons charges. J. A. 88. In a separate proceeding, Lindh argued that he was not guilty by reason of a mental disease, a claim the jury rejected. J. A. 88-89.

One of the expert witnesses for the state regarding Lindh's mental condition at the time of the shooting was Dr. Leigh Roberts. Dr. Roberts had interviewed Lindh on the day of the shootings and two times thereafter. J. A. 90-95. During this period, Dr. Roberts learned he might be accused of engaging in improper sexual conduct with a female patient. J. A. 93. To avoid a conflict, the district attorney transferred that investigation to another county and had no further involvement in the matter. J. A. 94-95. The trial judge granted a motion *in limine* preventing cross-examination on this topic, finding that its probative value, if any, was outweighed by its prejudicial effect. J. A. 98-99. Dr. Roberts' testimony at trial was reinforced by a second expert, Dr. Fosdal, who testified that Lindh had a personality disorder, not a mental disease, and did not meet the criteria for the mental defense. J. A. 100-101.

On appeal, Lindh argued that the trial judge unduly restricted the cross-examination of Dr. Roberts because the allegations were relevant as a potential source of bias. J. A. 82. The Court of Appeals reversed on state law grounds, without reaching the constitutional question. J. A. 82. The Supreme Court of Wisconsin reversed the appellate court and affirmed the conviction. J. A. 122. One justice dissented. J. A. 128. Lindh filed a collateral attack in federal court. The District Court "agree[d] wholeheartedly with the analysis of the Wisconsin Supreme Court." J. A. 150.

While Lindh's appeal was pending, the Antiterrorism and Effective Death Penalty Act of 1996 ("the Act") was signed into law. *Lindh* v. *Murphy*, 96 F. 3d 856, 860 (CA7 1996). The

Court of Appeals held that the Act's amendments to 28 U. S. C. § 2254(d) applied to Lindh's habeas petition. *Id.*, at 867. Applying the amended statute, the Court of Appeals affirmed the District Court's denial of Lindh's petition. *Id.*, at 877.

SUMMARY OF ARGUMENT

New subdivision (d) of 28 U. S. C. § 2254 establishes a "middle ground" rule of preclusion, lying between res judicata and *de novo* review. This rule is analogous to the rule preventing relitigation on a section 2255 petition of an issue resolved on appeal. It ends the practice of the lower federal courts treating the judgments of state courts as if they were inferior courts.

The statute says nothing about the temporal extent of the Chapter 153 amendments, including the section at issue in this case. Section 107(c) of the bill, by its terms, applies only to section 107. Subdivision (b) of 28 U. S. C. § 2264 is derived from a proposal which did not include any amendments to section 2254; hence, the "retroactivity" of those amendments could not be its purpose, as petitioner contends.

Under the "default" rules of *Landgraf* v. *USI Film Products*, the new statute applies to pending cases. It is a procedural change. It governs prospective relief. It shares with jurisdictional changes the characteristic that makes them applicable to pending cases.

The present case illustrates the wisdom of the new rule and the value of applying it to pending cases.

ARGUMENT

I. Section 2254(d) establishes a modified res judicata rule.

The Court's order granting certiorari in this case limited the question to the application of 28 U. S. C. § 2254(d) to pending cases, denying review of the Seventh Circuit's interpretation and application of that provision. See Pet. for Cert. i; J. A. 233. However, since the answer to the question presented depends on "the nature and extent of the change in the law," *Landgraf* v.

USI Film Products, 511 U. S. 244, 270 (1994), some discussion of that change is essential.

A. The Dual Nature of Habeas as a Collateral Attack.

Petitioner places a great weight on the statement of *Ex parte Tom Tong*, 108 U. S. 556, 559-560 (1883) that a habeas petition is "a new suit brought . . . to enforce a civil right . . . ." Brief for Petitioner 12. His discussion of the effect of application of the statute as divesting a "matured cause of action," see *id.*, at 39-44, is based on this characterization of habeas as a new, independent suit as opposed to a quasi-appellate continuation of the criminal case.

Counsel for petitioner is apparently a recent convert to this point of view. Elsewhere, he has emphatically proclaimed the appellate nature of habeas corpus. See 1 J. Liebman & R. Hertz, Federal Habeas Corpus Practice and Procedure § 2.4b, p. 23 (2d ed. 1994); Liebman, Apocalypse Next Time: The Anachronistic Attack on Habeas Corpus/Direct Review Parity, 92 Colum. L. Rev. 1997, 2091-2092 (1992).

Actually, habeas corpus is something of a curious hybrid.[2] In form, it is a civil action against the jailer. In substance, though, it is a request for one court to nullify a decision of another court, and in that sense it is appellate.

The dual nature appears in the earliest cases. The Supreme Court can issue original habeas writs, despite its very limited original jurisdiction, because such writs in practice revise the decisions of other courts and thus are appellate in nature. *Ex parte Bollman*, 4 Cranch 75, 101 (1807); *Ex parte Watkins*, 7 Pet. 568, 572-573 (1833) ("*Watkins II*"); see also *Felker* v. *Turpin*, 518 U. S. ___, 135 L. Ed. 2d 827, 838, 116 S. Ct. 2333, 2339 (1996) (discussing original habeas writs as part of appellate jurisdiction). However, in the absence of actual appellate jurisdiction to review a judgment, the unreversed final

2. We refer in this discussion to habeas petitions by persons in custody pursuant to court order. When habeas is used to dispute private custody, see, *e.g.*, *Ex parte Barry*, 2 How. 65, 65 (1844), or arrest by the executive without judicial authorization, see *Ex parte Vallandigham*, 1 Wall. 243, 251-253 (1864), it is purely an original action.

judgment of a court of competent jurisdiction originally could not be reversed on habeas, *Felker*, 135 L. Ed. 2d, at 839, 116 S. Ct., at 2340 (quoting *Ex parte Watkins*, 3 Pet. 193, 202, 207 (1830) ("*Watkins I*")), not even on constitutional questions. See *Watkins II*, 7 Pet., at 574 (Eighth Amendment attack on judgment). Early cases granting habeas relief involved nonfinal commitment orders, see *Bollman*, 4 Cranch, at 76, or jurisdictional questions. See *Ex parte Milligan*, 4 Wall. 2 (1866) (civilian tried by military court); see also *Watkins I*, 3 Pet., at 208 (distinguishing *Bollman* and other cases as not involving final judgments).

The essence of habeas corpus as a collateral attack is that the petitioner asks the court to nullify a previous decision. The rules governing the granting of such relief are therefore rules governing the effect in one proceeding of a decision rendered in another. This question is not unique to habeas corpus; it arises in all areas of law.

B. Treatment of Prior Adjudication.

The question raised by a prior decision of an issue produces an entire spectrum of answers. *De novo* reconsideration and res judicata preclusion are the endpoints of this spectrum, but there are a number of responses in between. Thus, the fact that the first court's decision is not res judicata does not necessarily entitle the litigant *de novo* reconsideration. In some circumstances, a first judgment which is not res judicata can nonetheless "be considered, and even given controlling weight." *Salinger* v. *Loisel*, 265 U. S. 224, 230-231 (1924).

De novo review is the general rule when an appellate court directly reviews the decision of a lower court on a question of law. *Elder* v. *Holloway*, 510 U. S. 510, 516 (1994). At the other end of the spectrum, the final judgment of a court of competent jurisdiction generally precludes relitigation of the issue between the same parties, regardless of the relative status of the two courts and regardless of the importance of the question. See *Allen* v. *McCurry*, 449 U. S. 90, 105 (1980) (state court holding on federal constitutional question has collateral estoppel effect in federal civil suit).

Not all direct review is *de novo*, however. On some issues, appellate courts only ask whether the trial court's decision was clearly erroneous. These issues are designated questions of fact. See *Pierce* v. *Underwood*, 487 U. S. 552, 558 (1988). However, "the practical truth" is that this label "is sometimes as much a matter of allocation as it is of analysis," *Miller* v. *Fenton*, 474 U. S. 104, 113-114 (1985), and the classification may turn on determinations about "the sound administration of justice." *Id.*, at 114. Confidence or lack of confidence in the first tribunal may be the real ground for the classification. *Ibid.*

Outside of the direct review context, an example of a "middle ground" standard is the doctrine of the law of the case. When an issue decided once is brought up again in the same case, either in the same court or a coordinate court, the general rule is that the issue will not be redecided unless the first decision was clearly wrong. The second court (or second judge or panel of the same court) need not agree with the initial decision. So long as that first decision is "plausible," the second court's "inquiry is at an end." *Christianson* v. *Colt Industries Operating Corp.*, 486 U. S. 800, 819 (1988). There are exceptions to the rule when the facts are found to be materially different on retrial or when the governing law has changed in the interim. See 1B J. Moore, Moore's Federal Practice ¶0.04[1], pp. II6-II9 (2d ed. 1996).

A second type of "middle ground" preclusion arises when a prisoner seeks to relitigate within the same judicial system a question decided against him on appeal. For federal prisoners, this is done via a motion under 28 U. S. C. § 2255.

> "If a matter has been decided adversely to the defendant on direct appeal, it cannot be relitigated on collateral attack. Reconsideration is permitted, however, if there has been an intervening change in the law and the new law would have exonerated defendant had it been in force before his conviction was affirmed on the direct appeal." 3 C. Wright, Federal Practice and Procedure § 593, pp. 439-440 (2d ed. 1982).

Most states have similar rules for review within the state system. See, *e.g.*, *In re Harris*, 5 Cal. 4th 813, 829, 855 P. 2d 391, 395 (1993) (general rule of preclusion, with exceptions).

Should a rule of preclusion that applies within the judiciary of a single sovereign have any less force across jurisdictions? That is, should the federal judiciary give a judgment less preclusive effect merely because it comes from a state court? Generally,

> "[t]he answer is no. Absent a partial repeal of the Full Faith and Credit Act, 28 U. S. C. § 1738, by another federal statute, a federal court must give the judgment the same effect that it would have in the courts of the State in which it was rendered." *Matsushita Elec. Indus.* v. *Epstein*, 516 U. S. ___, 134 L. Ed. 2d 6, 14, 116 S. Ct. 873, 876 (1996).

At least since *Brown* v. *Allen*, 344 U. S. 443 (1953), the habeas corpus statute has been considered such a partial repeal. Congress has now adopted a unique rule for habeas corpus, with its own standard of preclusion and exceptions, rather than adopting the state's rules. This might be called the Nearly Full Faith and Credit Act.

C. Past Treatment of Prior Decisions on Habeas Corpus.

In the past, the treatment of prior decisions in habeas proceedings has run the entire spectrum. Originally, a prior denial of habeas was not res judicata, and each judge presented with a petition would review it *de novo*. *McCleskey* v. *Zant*, 499 U. S. 467, 479 (1991). However, a final criminal judgment *was* res judicata. "An imprisonment under a judgment cannot be unlawful, unless that judgment be a nullity; and it is not a nullity, if the court has general jurisdiction of the subject, although it should be erroneous." *Ex parte Watkins*, 3 Pet., at 203.

In the late nineteenth and early twentieth century, both of these rules softened. The availability of appeal from denial of habeas prompted more restraint in the consideration of successive petitions. See *McCleskey*, 499 U. S., at 479-481. During the same period, this Court expanded and finally dropped the pretense of limiting habeas to jurisdictional questions, see *Johnson* v. *Zerbst*, 304 U. S. 458, 468 (1938); *Waley* v. *Johnston*, 316 U. S. 101, 104-105 (1942) (*per curiam*), and

reconsidered on federal habeas nonjurisdictional questions already decided in state court proceedings.

Prior to *Brown*, the same discretion that permitted denial of a successive petition also permitted denial of a federal petition raising a claim rejected in state court and denied certiorari by this Court. *Ex parte Hawk*, 321 U. S. 114, 118 (1944) (*per curiam*) stated that "a federal court will not ordinarily reexamine upon habeas corpus the questions thus adjudicated," citing *Salinger* v. *Loisel*, 265 U. S. 224 (1924), a successive petition case.

In recent years, the general rule has been that a prior federal adjudication, whether on appeal in federal criminal cases, a decision in this Court, or a prior federal collateral review, has preclusive effect with some exceptions. See *ante*, at 6 (federal criminal cases); 28 U. S. C. § 2244(c) (decision by Supreme Court); *id.*, at subd. (b) (successive federal petition); *McCleskey*, 499 U. S., at 490 (prior federal petition by state prisoner, "cause and prejudice" test for new claims). However, the prior state court ruling on questions of federal law or "mixed questions" of law and fact had no preclusive effect, and the issue would be relitigated *de novo*. See *Withrow* v. *Williams*, 507 U. S. 680, 694 (1993).

This is the same standard that applies to decisions of lower courts when their judgments are reviewed on appeal by a higher court. See *ante*, at 5. Despite this Court's repeated statements through the centuries about the equal status of the state courts, they were being treated as inferiors. Cf. *Bollman*, 4 Cranch, at 97 ("state courts are not, in any sense of the word, inferior courts . . ."); *Robb* v. *Connolly*, 111 U. S. 624, 637 (1884) (equal responsibility for enforcing constitutional rights); *Sawyer* v. *Smith*, 497 U. S. 227, 241 (1990) ("coequal parts of our national judicial system"). At long last, Congress has acted to correct this error.

D. Nature of the New Standard.

Since the underlying facts of the present case are not disputed, we need only consider the new standard as it applies to questions of law and mixed questions:

> "(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; . . . ." 28 U. S. C. § 2254(d).

In floor debates in both houses, this was called a deferential standard by every member who spoke on the question, opponents as well as supporters. See 141 Cong. Rec. S7835, col. 2 (daily ed. June 7, 1995) (remarks of Sen. Lott, in favor); *id.*, at S7838, col. 3 (Sen. Cohen, opposed); *id.*, at S7841, col. 2 (Sen. Biden, opposed); *id.*, at S7847, col. 1 (Sen. Specter, in favor); *id.*, at S7848, col. 1 (Sen. Hatch, in favor); 142 Cong. Rec. H2182, cols. 1-2 (daily ed. Mar. 13, 1996) (Mr. Hyde, in favor); *id.*, at H2183, col. 1 (Mr. McCollum, in favor); 142 Cong. Rec. H2248, col. 1 (daily ed. Mar. 14, 1996) (Mrs. Chenoweth, opposed).

The majority opinion in the Seventh Circuit in this case seems to balk at the word "deference." See *Lindh* v. *Murphy*, 96 F. 3d 856, 868 (CA7 1996). Yet the opinion then goes on to hold that, at least in the context of the present case, "a 'reasonable' decision by the state court must be honored," *id.*, at 871, which is exactly what the proponents meant by "deference." See 141 Cong. Rec. S7848, col. 1 (remarks of Sen. Hatch). The substance is more important than the label.

In interpreting a statute, the text is, of course, paramount. "[A] committee of Congress cannot take language that could only cover 'flies' or 'mosquitos' and tell the courts that it really covers 'ducks.' " *Wisconsin Public Intervenor* v. *Mortier*, 501 U. S. 597, 611, n. 4 (1991). However, legislative history can be used, to the extent it does not contradict the text, "in a good-faith effort to discern legislative intent." *Id.*, at 612, n. 4.

The standard actually adopted by Congress has a fairly sparse legislative history, because it emerged rather late in the habeas debate. Earlier proposals typically sought to apply the "full and fair" standard of *Stone* v. *Powell*, 428 U. S. 465, 494-

495 (1976) across the board. See, *e.g.*, S. 8, §205, 103d Cong., 1st Sess. (1993). *Stone* makes "the correctness of the state court resolution . . . irrelevant." *Siripongs* v. *Calderon*, 35 F. 3d 1308, 1321 (CA9 1994). The standard adopted appears to have emerged for the first time in S. 635 in 1995.

The best legislative history we have for this provision lies in the Senate debate on two proposed amendments. Senator Kyl proposed language similar to the District of Columbia statute at issue in *Swain* v. *Pressley*, 430 U. S. 372 (1977). This amendment would have effectively eliminated federal habeas corpus as a postconviction review for state prisoners. See 141 Cong. Rec. S7829-7830. Senator Biden proposed to "strike[] the deference rule and allow[] the current practice of independent review," *i.e.*, *Brown* v. *Allen*. *Id.*, at S7841-7842. The Senate rejected both amendments, *id.*, at S7849-7850, thus adopting the current standard as a compromise. See *id.*, at S7847, col. 3 (remarks of Sen. Specter).

Senator Biden offered a clause-by-clause analysis of the deference standard, while arguing against it. *Id.*, at S7842. Disregarding the opinions expressed on the wisdom of the change and simply looking at his assessment of the structure of the subsection, that assessment is substantially correct. We will follow a similar path in our analysis.

1. The general rule: no relitigation.

The main body of 28 U. S. C. §2254(d) states, "An application for a writ of habeas corpus on behalf of a person in custody pursuant to a judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless . . . ." As Senator Biden explained, "The general principle in this language in the Hatch bill is that Federal courts shall not grant a claim that was adjudicated in State court proceedings. That is what is at the top." 141 Cong. Rec. S7842, col. 1.

Up to this point, Senator Biden is correct. He then goes on to state, "this is directly contrary to the purpose of habeas corpus . . . ." *Ibid.* In reality, this is simply a return to pre-*Brown* law. The normal procedure was then (and is again now) to refuse to "re-examine upon habeas corpus the questions thus

adjudicated." *Ex parte Hawk*, 321 U. S. 114, 118 (1944); see *ante*, at 8. Relitigation is the exception.

2. "Clearly established."

The general rule against relitigation does not apply if the state proceedings "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States . . . ." 28 U. S. C. §2254(d)(1). Bypassing the first clause for now, we will first address the term "clearly established."

"[I]f a word is obviously transplanted from another legal source . . . it brings the old soil with it." Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 537 (1947). The term "clearly established" appears to be transplanted from the qualified immunity doctrine of the *Harlow* v. *Fitzgerald*, 457 U. S. 800 (1982) line of cases.

There are several reasons for believing that this term is transplanted from *Harlow*. First, the term "clearly established" is used as a term of art with a specific legal meaning only in those cases. A computer search for that term in Supreme Court opinions turns up only immunity cases and scattered generic uses of the term. Second, Senator Hatch referred specifically to *Harlow* in defending this standard. 141 Cong. Rec. S7848, col. 1. Third, preexisting case law had already connected habeas with the immunity cases.

Sawyer v. *Smith*, 497 U. S. 227, 236 (1990) concerned a claim that *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985) had been "dictated" by earlier precedent and hence was not a "new rule":

> "We do not doubt that our earlier Eighth Amendment cases lent general support to the conclusion reached in *Caldwell*. But neither this fact, nor petitioner's contention that state courts 'would have found *Caldwell* to be a predictable development in Eighth Amendment law,' Brief for Petitioner 8, suffices to show that *Caldwell* was not a new rule. In petitioner's view, *Caldwell* was dictated by the principle of reliability in capital sentencing. But the test would be meaningless if applied at this

level of generality. Cf. *Anderson* v. *Creighton*, 483 U. S. 635, 639 (1987) ('[I]f the test of "clearly established law" were applied at this level of generality, . . . [p]laintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights')."

Thus even before the new Act, habeas and immunity shared common ground on the degree of specificity of the rule that state actors were alleged to have violated. *Anderson* defined "clearly established" this way:

> "The contours of the right must be sufficiently clear that a reasonable officer would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, [citation], but it is to say that in light of pre-existing law the unlawfulness must have been apparent." 483 U. S., at 640.

For questions of pure law, as opposed to mixed questions, the requirement that unlawfulness be "apparent" is equivalent to the *Teague* requirement that the rule be "dictated" by precedent. Just as a law enforcement officer is immune if he reasonably could have believed his action was lawful, *id.*, at 641, so the state court judgment is "immune" from habeas if "reasonable jurists may disagree" at the time the state decision becomes final. *Sawyer*, 497 U. S., at 234.

The major change in the law comes in the case of mixed questions, which we will discuss further in part I C 4 below.

3. "As determined by the Supreme Court."

With this phrase, Congress has clarified a long-simmering problem. State courts are not obligated under the doctrine of *stare decisis* to follow the precedents of any federal court but the Supreme Court. *Lockhart* v. *Fretwell*, 506 U. S. 364, 376 (1993) (Thomas, J., concurring). Yet the lower federal courts have, until now, had the power to overturn state holdings based on those precedents. This is a most awkward situation for a state court which firmly believes circuit precedent to be wrongly

decided. See *People* v. *Santamaria*, 8 Cal. 4th 903, 923, 884 P. 2d 81, 92 (1994).

In one of the great ironies of the Congressional debate, Senator Biden sought to denounce this provision but actually illustrated its wisdom.

> "For example, an appeals court recently held that a defendant cannot be prosecuted criminally and have his property forfeited under the civil forfeiture laws because of the double jeopardy clause prohibiting that. That ruling is clear. It is unambiguous. But it is not a Supreme Court ruling. Under this bill, a State court, which subsequently refused to follow that interpretation, could not be corrected by habeas corpus review because it could never get back into the Federal court system." 141 Cong. Rec. S7842, col. 3 (daily ed. June 7, 1995).

This is clearly a reference to *United States* v. *$405,089.23*, 33 F. 3d 1210 (CA9 1994). Contrary to Senator Biden's statement, the "error" of a state court's refusal to follow this case does not require "correction" on habeas, because it is not error. See *United States* v. *Ursery*, 135 L. Ed. 2d 549, 558, 116 S. Ct. 2135, 2139 (1996) (reversing *$405,089.23*).

This Court has implicitly followed the same principle in its *Teague* cases. Absent a controlling Supreme Court precedent, "in the *Teague* analysis the reasonable views of state courts are entitled to consideration along with those of federal courts." *Caspari* v. *Bohlen*, 510 U. S. 383, 394-395 (1994). The rule Bohlen sought, but which Missouri courts rejected, would have been "new" despite a federal court of appeals precedent accepting it. The new Act makes explicit what was implicit under *Teague*. So long as the state courts follow the precedents they are obligated to follow, those of the Supreme Court, they are not violating established precedent.

4. "Contrary to or an unreasonable application of."

With the meaning of "clearly established" in mind, we return to the phrase "contrary to or an unreasonable application of." Courts must assume that Congress intended each branch of this disjunctive phrase to have meaning and for neither to be super-

fluous. See *Bailey* v. *United States*, 516 U. S. ___, 133 L. Ed. 2d 472, 481, 116 S. Ct. 501, 507 (1995).

In *Baylor* v. *Estelle*, 94 F. 3d 1321 (CA9 1996), the Ninth Circuit appears to have taken the view that the "contrary to" branch authorizes a grant of relief any time the federal habeas court disagrees with the state court's application of a preexisting Supreme Court precedent. Such an interpretation would render the "unreasonable application" branch a nullity, and indeed the *Baylor* court omits that phrase in paraphrasing the statute. *Id.*, at 1325. This cannot be correct. The "unreasonable application" branch was purposely included and vigorously debated. 141 Cong. Rec. S7842, cols. 1-2 (remarks of Sen. Biden); *id.*, at S7848, col. 1 (remarks of Sen. Hatch). It must have a meaning.

The most reasonable interpretation of this two-branch standard is that "contrary to" applies to the choice of the federal rule and "unreasonable application of" applies to the application of that rule to the particular facts, as the Court of Appeals held in this case. See *Lindh* v. *Murphy*, 96 F. 3d, at 870. Suppose, for example, a defendant claims ineffective assistance of counsel. If the state court, for whatever reason, ignores or overlooks *Strickland* v. *Washington*, 466 U. S. 668 (1984) and instead applies the long-discredited "farce or sham" standard, that would be "contrary to . . . clearly established Federal law." Cf. *Allen* v. *McCurry*, 449 U. S. 90, 101 (1980) (possible exception to preclusion in civil rights suit "where a state court failed to even acknowledge the existence of the constitutional principle on which a litigant based his claim").

Far more common is the situation where the state court recognizes the correct standard and applies it to the facts, but the petitioner on habeas claims the application was wrong. This is where the "unreasonably applied" branch governs.

> "What does this mean? It means that if the State court reasonably applied Federal law, its decision must be upheld. Why is that a problematic standard? After all, Federal habeas review exists to correct *fundamental* defects in the law. If the State court has reasonably applied Federal law it is hard to say that a fundamental

> defect exists." 141 Cong. Rec. S7848, col. 1 (remarks of Sen. Hatch) (emphasis added).

Any time one court overturns the judgment of another court, it may be correcting error or it may be injecting error, overturning a correct judgment and substituting an erroneous one. See, *e.g.*, *Adamson* v. *Ricketts*, 865 F. 2d 1011, 1027 (CA9 1988) (Arizona death penalty unconstitutional because judge, rather than jury, finds qualifying circumstances); *Walton* v. *Arizona*, 497 U. S. 639, 647-649 (1990) (that issue had been settled the other way years earlier); *Dunn* v. *Simmons*, 877 F. 2d 1275, 1278 (CA6 1989) (Kentucky procedure for adjudicating validity of prior conviction violates "federal standards"); *Parke* v. *Raley*, 506 U. S. 20, 28 (1992) (Kentucky rule "easily passes constitutional muster"); *Collins* v. *Lockhart*, 754 F. 2d 258 (CA8 1985) (Arkansas death penalty law unconstitutional in part); *Perry* v. *Lockhart*, 871 F. 2d 1384, 1393 (CA8 1989) (*Collins* overruled as irreconcilable with later Supreme Court precedent).

The judgment of the court of last resort is "correct" by definition, see *Brown* v. *Allen*, 344 U. S., at 540 (opinion of Jackson, J.), but this Court cannot review every criminal case in the nation, or even a significant fraction of them. Hence some risk of error must be tolerated. There is no perfect solution to this dilemma. Congress has decided to let the state court decision stand in the "gray zones," while retaining a role for the federal courts to correct decisions outside the bounds of reasonable disagreement.

5. The co-equal state judiciary.

Whether this standard is called "deference" or something else is not important. What is important is that Congress has commanded a renewed respect for state courts and their judgments.

The new standard thus falls into the same class of rules as law of the case and the rule against reconsideration on a 2255 motion of issues settled on appeal. Like the rule on successive petitions, it is "a modified res judicata rule." Cf. *Felker* v. *Turpin*, 135 L. Ed. 2d 827, 840, 116 S. Ct. 2333, 2340 (1996). These are "middle ground" rules of preclusion which apply to

the decision of a *coordinate* court when the strict bar of res judicata is inapplicable.

The nature of the rule would be irrelevant if Congress had specified its application or nonapplication to pending cases, since none of the constitutional limits on retroactivity is applicable. In part II, we will show that Congress was silent on the question. In part III, we will show that under *Landgraf* v. *USI Film Products*, 511 U. S. 244 (1994) rules of this type apply to pending cases.

II. The statute is silent on the application of the Chapter 153 amendments to pending cases.

A. Silence and Negative Implication.

Public Law No. 104-132 made many changes to habeas corpus law. They can be classified in three groups. Sections 101 through 106 changed general habeas law in all cases. Section 107 added a special Chapter 154 to Title 28 U. S. C., applicable only to state (not federal) prisoners sentenced to death in states that meet certain requirements regarding appointments of counsel. See 28 U. S. C. § 2261(a).

Sections 108 and 903 amended 21 U. S. C. § 848(q), paragraphs (9) and (10) respectively. Paragraph (q)(4)(B) of that section provides appointment of counsel in federal collateral proceedings in *all* capital cases, both state and federal. Paragraphs (9) and (10) govern funding for expert and investigative services and compensation of counsel, respectively, and thus apply to all capital habeas and 2255 cases. See 1 Liebman & Hertz, *supra*, § 12.3b, at 380.

Congress expressly addressed the applicability to pending cases of the second group and part of the third. Section 107(c) of the Act makes new Chapter 154 applicable to pending cases. This provision has little practical effect, however, since the new chapter by its terms applies only when a state meets certain requirements, and no state's pre-Act appointment provisions have been found to qualify. See *Mata* v. *Johnson*, 99 F. 3d 1261, 1267 (CA5 1996) (Texas); *Bennett* v. *Angelone*, 92 F. 3d 1336, 1342 (CA4 1996) (Virginia); *Hill* v. *Butterworth*, 941 F. Supp. 1129, 1143-1144 (ND Fla. 1996); *Booth* v. *Maryland*,

940 F. Supp. 849, 855 (D Md. 1996); *Zuern* v. *Tate*, 938 F. Supp. 468, 472 (SD Ohio 1996); *Ashmus* v. *Calderon*, 935 F. Supp. 1048, 1074 (ND Cal. 1996); *Austin* v. *Bell*, 927 F. Supp. 1058, 1062 (MD Tenn. 1996). Section 107(c) does not mention any other provision of the Act.

As amended, 21 U. S. C. § 848(q)(10) caps attorneys' compensation per hour and sets a per-case cap on investigator and expert fees. Given the holding of *Bradley* v. *School Bd. of Richmond*, 416 U. S. 696, 711 (1974), these caps would probably apply to services rendered after the date of enactment in pending cases, in the absence of statutory language to the contrary. However, Congress expressly provided in section 903(c) of the Act that these caps would apply only to cases or appellate proceedings commenced or perfected, respectively, on or after the date of the Act. The amendment to 21 U. S. C. § 848(q)(9) severely limits *ex parte* applications for funding, but the statute is silent on its application to pending cases.

It would be absurd to argue that the express limitation of amended § 848(q)(10) to new cases mandates the application of all other habeas-related provisions to all pending cases. Such a mandatory inference would require that completed *ex parte* orders be vacated under new § 848(q)(9) or that previously filed habeas petitions be dismissed under the new statute of limitations, 28 U. S. C. § 2244(d). Petitioner's negative implication argument is no stronger. When Congress specified the temporal reach of sections 107 and 903 of the Act, it was focussed on those sections. If it had meant to say anything about the temporal extent of sections 101 through 106 and 108, it would have.

There are any number of reasons why Congress did not specify whether the Chapter 153 amendments would apply to pending cases. The first possibility is that the optimum rule would be complex to draft. Some provisions should not apply to some pending cases. The new statute of limitation, 28 U. S. C. § 2244(d), should not oust a petition filed before the Act but more than a year after exhaustion of state remedies. The traditional rule is that the clock begins running upon enactment of the statute or accrual of the cause of action, whichever is later, when the statute does not specify otherwise. See *Sohn* v. *Waterson*, 17 Wall. 596, 600 (1873). A simple statement that

sections 101 to 106 in their entirety apply to all pending cases would raise doubts about the application of that sensible rule. Similarly, the new limits on evidentiary hearings, 28 U. S. C. § 2254(e)(2), should not vitiate the findings of hearings already held.

An attempt to pick through the sections one by one and specify which ones apply to which pending cases would raise new complexity and new bones of contention in an already complex and contentious bill. Congress as a whole may have felt that leaving the question to the courts applying the *Landgraf* approach would produce as good a result as Congress was likely to achieve, without opening this can of worms in the bill.

A second, and closely related, possibility is that Congress simply could not agree. See *Landgraf*, 511 U. S., at 263. Unlike *Landgraf*, there is no legislative history to this effect, but it remains a possibility.

The absence of any history on the point suggests a third possibility, that Congress simply did not consider the point. This possibility is not negated by the placement of section 107(c) in the bill by an anonymous drafter, when that section was never mentioned in the debate. The drafter of that provision may have foreseen that Chapter 154 would be less controversial than Chapter 153, and an express provision for application to pending cases could be inserted without controversy, while that was not true with Chapter 153.[3]

Petitioner insists that by specifying the application of Chapter 154 to pending cases and remaining silent on Chapter 153, Congress intended to convey the message that the latter only applied to cases *filed* after the passage of the Act. That would be "a surprisingly indirect route to convey an important and easily expressed message . . . ." *Landgraf*, 511 U. S., at 262.

First, that very argument had just recently been rejected in *Landgraf*, on a bill even more controversial than this one. *Id.*, at 262-263. If the members who favored limiting application to new cases had the votes to include such language expressly, they

3. Senator Biden, the principal opponent of section 2254(d), accepted Chapter 154 and included it in his own proposed amendment, "effective date" and all. 141 Cong. Rec. S7793 (daily ed. June 6, 1995).

would have been foolish to rely on an implication which so closely resembles the one rejected in *Landgraf*.

Second, nothing in *Landgraf* even remotely implies that the date of filing rather than the date of finality of the previous decision would be the controlling event. To the extent that sections 2244(b) and 2254(d) "attach[] new legal consequences to events completed before [their] enactment," *Landgraf*, 511 U. S., at 270, those "events" could only be the prior adjudications: the previous federal petition for section 2244(b) and the state proceedings for section 2254(d). Cf. *id.*, at 286 ("cases arising," not cases filed, before enactments). Yet this Court has already applied the new standards in a case where the earlier proceeding occurred prior to enactment of the Act. *Felker* v. *Turpin*, 518 U. S. ___, 135 L. Ed. 2d 827, 838-839, 116 S. Ct. 2333, 2338-2339 (1996). Petitioner's theory that his "cause of action" had "matured" upon filing rather than some earlier event, Brief for Petitioner 40, deserves points for creativity, but the odds it ever occurred to Congress are nil.

B. Section 2264(b).

Petitioner asserts with vigor that "the sole function of [28 U. S. C. § 2264(b)] is to apply certain specified provisions found in the otherwise nonretroactive Chapter 153 to pending cases covered by Chapter 154." Brief for Petitioner 25. The history of Chapter 154 unequivocally refutes that contention.

Almost nine years ago, the Chief Justice appointed a committee chaired by retired Justice Lewis Powell to address the problems of capital habeas cases. Judicial Conference of the United States, Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Committee Report and Proposal 1 (1989) ("Powell Committee Report"). The Committee proposed redesignating the existing sections of Chapter 153 as Subchapter A, but otherwise leaving them unchanged, and adding a new Subchapter B. *Id.*, at 9. Chapter 154, as enacted, is substantially the Powell Committee's Subchapter B.

The Committee's proposed section 2259, *id.*, at 21-22, is the source of enacted section 2264. A side-by-side comparison is helpful, and both the proposed and enacted versions are reprinted in the Appendix.

Incorporation of otherwise inapplicable changes to section 2254 could not possibly have been the purpose of subdivision (b) as originally drafted, because it was part of a proposal that did not make any changes to that section. The original purpose of the section as a whole is set forth in the Committee's comments, which are also reprinted in the Appendix.

Petitioner considers it "outlandish" that section 2264 was intended to replace the exhaustion rule of section 2254(b), Brief for Petitioner 26, but that was precisely the drafters' intent. See *post*, at A-2. While the state does have an interest in the exhaustion rule, it also has an interest in prompt resolution of capital cases, and "*Lundy* ping-pong" severely interferes with that interest.

In a typical capital case, the defendant presents numerous claims to the state court and is denied. Then he wants to present those claims plus some more to the federal court. At present, the defendant must return to state court to present those claims, only to be told, in the typical case, that they are defaulted. See, *e.g.*, *Morales* v. *Calderon*, 85 F. 3d 1387, 1388-1389 (CA9 1996), cert. denied *sub nom. Calderon* v. *Morales*, No. 96-355 (Nov. 18, 1996).[4] The federal court must then wade hip-deep into state law to decide whether the default rule is "adequate," see *id.*, at 1392, a murky area of the law with only cryptic guidance from this Court. See *Dugger* v. *Adams*, 489 U. S. 401, 410-412, n. 6 (1989) (relegating the entire issue to a footnote). If the state bar is adequate, the federal court must apply the "cause and prejudice" rules. See *Murray* v. *Carrier*, 477 U. S. 478, 495-496 (1986).

For capital cases in "opt-in" states, section 2264 sweeps away this complexity. In effect, it declares all claims not presented to the state courts on appeal or the first habeas to be defaulted, and it permits their consideration only for three specific kinds of "cause." Paragraph (a)(1) is the quintessential "cause," concealment by the government. See *Amadeo* v. *Zant*,

4. Justice O'Connor noted the potential problem in *Harris* v. *Reed*, 489 U. S. 255, 269-270 (1989) (concurring opinion). Unfortunately, the procedural default rules, state and federal, have not been sufficiently clear to prevent it.

486 U. S. 214, 222 (1988). Paragraph (a)(2) is *Reed* v. *Ross*, 468 U. S. 1, 16 (1984), but *Reed*-qualified rules are necessarily *Teague*-barred unless they qualify for a *Teague* exception. *Selvage* v. *Collins*, 975 F. 2d 131, 136 (CA5 1992); *Gacy* v. *Welborn*, 994 F. 2d 305, 310-311 (CA7 1993). This Court has yet to find a new rule that qualifies. Paragraph (a)(3) is *McCleskey* v. *Zant*, 499 U. S. 467, 498 (1991) ("reasonable and diligent investigation").

Congress did not adopt the Powell Committee draft intact. First, it eliminated the evidentiary hearing language, since section 2254(e) prescribes rules for evidentiary hearings. Second, it made more explicit the preclusion of new claims which do not qualify for the exceptions. Third, it deleted the phrase "on the merits" after "rule," to preclude any inference that *Teague* would not apply. See *Caspari* v. *Bohlen*, 510 U. S. 383, 389 (1994) (*Teague* is "threshold question in every habeas case"); *ibid.* ("before considering the merits").

Finally, Congress included references to the limitations in section 2254, subdivisions (a), (d), and (e) to reaffirm that these limits apply, even though (b) and (c) do not. The reference to unchanged subdivision (a) of section 2254 negates petitioner's thesis that the purpose of this cross-reference has anything to do with application of the amendments to pending cases. Section 2264, subdivision (b) was drafted as a permanent statement of the law, not as a mere transition provision.

In short, Congress has not made an "unambiguous directive," *Landgraf*, 511 U. S., at 263, regarding the application of the Chapter 153 amendments to pending cases. It has not even made an ambiguous directive. It has not made any directive at all. As in *Landgraf*, the Court must "look elsewhere" for the answer. *Ibid.* The "elsewhere" is the default rules set forth in *Landgraf*.

III. Section 2254(d) is a procedural change, and its application to pending cases is not "retroactive effect" within the meaning of *Landgraf*.

A. The Specialized Meaning of "Retroactive."

Under *Landgraf* v. *USI Film Products*, 511 U. S. 244 (1994), the question of whether a new law applies to pending cases is not the same as the question of whether it is "retroactive." In order "to reconcile two seemingly contradictory statements," *id.*, at 263-264, *Landgraf* gave a specialized meaning to the terms "retroactive" and "retrospective." The opinion repeatedly puts these terms in quotes to indicate that they have a specialized meaning. See *id.*, at 268, 269, 270, 277, 279.

"Changes in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity." *Id.*, at 275. Such application is simply not "retroactive" within *Landgraf*'s specialized meaning. Thus, a presumption that a statute will not be applied retroactively does not mean it is presumed to apply only to cases arising after its enactment or filed after its enactment. This presumption is the beginning, not the end, "of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event." *Id.*, at 270. It is true that Congress must speak clearly "if it wishes to make new legislation retroactive *in the Landgraf sense*." See Brief for the National Association of Criminal Defense Lawyers as *Amicus Curiae* 14 (emphasis added). But no one is contending to the contrary. The question is whether application to this case would be "retroactive" *in that sense*.

One obvious fallacy can be dismissed at the threshold. Despite *Landgraf's* admonition that determining retroactivity is "not always a simple or mechanical task," 511 U. S., at 268, *Boria* v. *Keane*, 90 F. 3d 36, 37 (CA2 1996) declared that if "the new statute would require a different outcome, application of the new statute . . . would be retroactive." That proposition cannot be reconciled with either the prospective relief cases or the jurisdictional cases. In *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U. S. 184, 201 (1921), the new

statute changed the outcome by forbidding certain previously allowed injunctions, yet it applied to pending cases. In *Bruner* v. *United States*, 343 U. S. 112, 117 (1952), the new statute resulted in the dismissal of Bruner's cause of action. While another forum had been available in the Court of Claims, *id.*, at 115, it would appear that in 1952 the statute of limitations had run on a claim for services during World War II. See *id.*, at 113; 28 U. S. C. § 2401; see also *Landgraf*, 511 U. S., at 293 (Scalia, J., concurring in the judgment). Nothing in the Court's opinion indicates it considered whether Bruner still could file in the Court of Claims or that its decision would be different if he could not. *Landgraf* reaffirms both *American Steel Foundries* and *Bruner*, 511 U. S., at 273-274. The outcome determinative effect of the statute does not determine the outcome of the *Landgraf* analysis.

Landgraf sought to relieve "apparent tension" between statements in prior opinions, *id.*, at 264, but some of the statements in *Landgraf* introduce new tension. *Landgraf* says "the court must ask whether the new provision attaches new legal consequences to events completed before its enactment." *Id.*, at 269-270. Yet a footnote to the sentence before this one quotes with approval a statement that "a statute 'is not made retroactive merely because it draws upon antecedent facts for its operation.' " *Id.*, at 270, n. 24. If a rule of law "draws upon antecedent facts" to produce its result, it would seem to necessarily "attach[] new legal consequences" to those facts.

"New legal consequences" cannot, therefore, be applied as a simplistic test. Instead, "the nature and extent of the change in the law," *id.*, at 270, must be considered. If the change wrought by this law is of similar nature and comparable or lesser extent when compared to other laws that have applied to pending cases, then this law should apply to this case.

B. Procedural Changes and Secondary Conduct.

Changes in procedural rules are generally not "retroactive" when applied to pending cases. *Landgraf*, 511 U. S., at 275. This is so because they "regulate secondary rather than primary conduct." *Ibid.* "Primary conduct" is the conduct of people in the ordinary course of life. In *Landgraf*, it was "the discriminatory conduct of respondents' agent . . . ." *Id.*, at 283. In the

present case, it is Aaron Lindh entering the City-County Building with a gun and shooting people.

"Secondary conduct" is the conduct of adjudication. In *Thorpe* v. *Housing Authority of Durham*, 393 U. S. 268 (1969), the primary conduct was the conduct of the parties in making a lease and carrying out or defaulting their obligations under the lease. The "secondary conduct" was the eviction proceeding, which was governed by a new regulation. See *Landgraf*, 511 U. S., at 276 (noting *Thorpe* "shares much" with "procedural" cases).

In the present case, the "secondary conduct" was Lindh's trial. Proceedings to review that trial are at least "secondary" within the meaning of *Landgraf*. Habeas corpus is so far removed it might even be called "tertiary conduct."

This tertiary status can be seen in this Court's application to pending cases of rules governing the habeas corpus process itself. While "new rules" governing trial are no longer applied to overturn final judgments, with very narrow exceptions, *Teague* v. *Lane*, 489 U. S. 288, 300 (1989), new rules governing habeas are routinely applied, regardless of which way they fall.

On the same day the Court decided *Teague* it established the "plain statement" rule in favor of defendants on procedural default questions. *Harris* v. *Reed*, 489 U. S. 255, 265 (1989). That rule had previously applied only on certiorari, *Michigan* v. *Long*, 463 U. S. 1032, 1042 (1983), which is typically a very remote possibility. Hence, state courts and prosecutors had little reason to make or request such statements. Even so, the *Harris* rule applied to pending cases, making claims eligible for consideration on habeas that would otherwise have been barred. See *Harris*, 489 U. S., at 285 (Kennedy, J., dissenting) (noting some claims clearly barred under state law will now be eligible).

Although this upset expectations, it was consistent with the principle of application of new procedural rules. Cf. *Landgraf*, 511 U. S., at 275. Similarly, other changes in habeas procedure, including *Teague* itself and *McCleskey* v. *Zant*, 499 U. S. 467 (1991), have applied to pending cases.

In discussing the "procedural" cases, *Landgraf* relied on the substantive/procedural distinction in the criminal *ex post facto*

cases, 511 U. S., at 275, n. 28, including *Collins* v. *Youngblood*, 497 U. S. 37 (1990). *Youngblood* defines procedural changes as "changes in the procedures by which a criminal case is adjudicated, as opposed to changes in the substantive law of crimes." *Id.*, at 45.

The statutory change in *Youngblood*, like that in the present case, governed neither the definition of a crime, the punishment for a crime, nor even the procedure for trying a crime. It governed remedies upon review of a criminal case. *Id.*, at 39-40. This was obviously procedural. *Id.*, at 44.

A closely analogous situation arose in 1919 when Congress enacted the "harmless error" statute, the predecessor of 28 U. S. C. §2111.[5] Some defendants whose convictions would have been reversed instead had them affirmed. Yet the statute was applied to pending cases without hesitation. See *Horning* v. *District of Columbia*, 254 U. S. 135, 139 (1920)[6]; see also *Camp* v. *Gress*, 250 U. S. 308, 318 (1919) (civil case).

In enacting this statute, Congress decided that certain errors previously thought to be sufficient to overturn a conviction on appeal would no longer have that effect. In the present Act, Congress has made that same determination with regard to collateral attack. The two changes are similar in nature. They are also comparable in extent because, even though the present Act reaches more serious errors, it does not cut off the only remedy. It reaches only claims already adjudicated on appeal or state habeas.

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5. The history of this statute is described in *Kotteakos* v. *United States*, 328 U. S. 750, 757-759 (1946).

6. Justice Brandeis disagreed with the majority's harmless error determination, 254 U. S., at 140 (dissenting opinion), and his position was ultimately vindicated. See *United States* v. *Gaudin*, 515 U. S. ___, 132 L. Ed. 2d 444, 456, 115 S. Ct. 2310, 2318 (1995). Yet he expressed no doubt that the statute applied to pending cases.

C. Jurisdictional Changes.

The "jurisdictional" cases involve changes similar in nature but *greater* in extent than the present case, yet these changes have uniformly applied to pending cases in the absence of contrary direction from Congress. *Landgraf*, 511 U. S., at 274. The essence of the present Act is that habeas petitioners no longer receive *de novo* review in federal court. Yet Congress could have simply repealed 28 U. S. C. §§ 2241(c)(3) and 2254, eliminating *any* federal court review and returning to antebellum law. Under this Court's precedents there is no question that this more drastic change would have applied to pending cases.

Hallowell v. *Commons*, 239 U. S. 506 (1916) involved the inheritance of property held by the United States in trust for an Indian who had died. Congress repealed the federal court's jurisdiction, thereby rendering the Secretary of the Interior's decision final with no judicial review at all. *Id.*, at 508. This act applied to pending cases. It "takes away no *substantive* right, but simply changes the tribunal that is to hear the case." *Ibid.* (emphasis added, quoted with approval in *Landgraf*, 511 U. S., at 274). Hallowell may very well have had a "matured cause of action" for the inheritance, but his action was nonetheless dismissed.

In *Sherman* v. *Grinnell*, 123 U. S. 679 (1887), a party was denied a federal forum by a statute making remand orders unreviewable. That act applied to require dismissal of an appeal from a remand order issued before enactment of the statute. *Id.*, at 680. Sherman had to make his case in state court. Similarly, in *The Assessor* v. *Osborne*, 9 Wall. 567 (1870), Osborne had a substantive right to recover overpaid taxes and a procedural right to litigate that claim in federal court. Congress abolished the latter ten days after he filed. *Id.*, at 569, 573. The statute applied to his case, and he had to go to state court. *Id.*, at 573-574.

Petitioner may argue that the jurisdiction cases are inapposite because the present Act is not jurisdictional.[7] The premise is debatable. The Act lies somewhere between the rule of *Teague*

7. More precisely, the argument in petitioner's overlong typed brief at page 56, but deleted from the printed version, may reappear in his reply.

v. *Lane*, 489 U. S. 288 (1989), which is not jurisdictional, *Youngblood*, 497 U. S., at 41, and the Tax Injunction Act, 28 U. S. C. § 1341,[8] which is. *California* v. *Grace Brethren Church*, 457 U. S. 393, 396 (1982). But even accepting the premise *arguendo*, the conclusion does not follow. The present Act shares the key characteristic that makes jurisdictional statutes apply to pending cases. It changes whose decision will control, rather than the underlying rule.

The substance of the underlying claim is the procedure of trial. The controlling rule is the Confrontation Clause, U. S. Const., Amdt. 6, and its case law corollaries, *Davis* v. *Alaska*, 415 U. S. 308 (1974) and *Delaware* v. *Van Arsdall*, 475 U. S. 673 (1986). Congress could not change this rule, and it has not attempted to do so. Congress can and has altered the relations of the two sets of courts which consider this question *seriatim*.

Congress has decided that, for debatable questions, the decision of the state courts will be final. In *Hallowell*, Congress had decided that the Secretary's decision of all questions, debatable or not, would be final. In *Sherman* and *Osborne*, cases went to state court for decision that would or might have remained in federal court. All of these changes are similar in nature but greater or equal in extent to the case at issue in this case. Yet all applied to pending cases.

D. Prospective Relief.

"Unlike certain other forms of relief, compensatory damages are quintessentially backward looking." *Landgraf*, 511 U. S., at 282. Habeas corpus is one of those "certain other forms." It is quintessentially forward looking.

Originally, habeas corpus was only for custody that is presently illegal. *McNally* v. *Hill*, 293 U. S. 131, 138 (1934). Later, this Court extended it, for largely practical reasons, to custody that was presently legal but would become illegal in the future. *Peyton* v. *Rowe*, 391 U. S. 54, 62, 63 (1968). Finally, the "collateral effects" of a conviction such as future inability to

8. That Act forbids federal adjudication, conditioned upon the availability of state remedies. It is therefore similar in function to the rule of *Stone* v. *Powell*, 428 U. S. 465, 494 (1976).

engage in certain businesses or to vote in the future were held sufficient to prevent mootness when the petition is filed during the challenged custody but petitioner is released while the case is pending. *Carafas* v. *LaVallee*, 391 U. S. 234 (1968).

However, in the absence of substantial present or future consequences of the challenged aspect of the judgment, there is no relief that a habeas corpus court can give. Thus, when a defendant attacks the sentence and not the conviction and the sentence has expired, the case must be dismissed as moot. *Lane* v. *Williams*, 455 U. S. 624, 631 (1982).

Habeas is thus like an injunction and unlike damages. Cf. *Ellis* v. *Railway Clerks*, 466 U. S. 435, 441-442 (1984) (injunction claim moot, damages claim remains). Habeas does not compensate the prisoner for past incarceration, and it does not punish the state for imposing it. It only prevents any further illegal custody. This relief is precisely analogous to the injunction against labor picketing in *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U. S. 184 (1921). See *Landgraf*, 511 U. S., at 273-274.

The history of the case has always been a factor in deciding whether relief will be granted. Even before the latest amendments, the statute gave preclusive effect, with some exceptions, to prior state court determinations of fact, see 28 U. S. C. § 2254, former subdivision (d) (1988 ed.), and prior federal court resolution of claims. See 28 U. S. C. § 2244, former subdivision (b) (1988 ed.). By adding state court resolution of questions of law and mixed questions to this list, Congress has taken a step similar in nature but lesser in extent to the one at issue in *American Steel Foundries*. Rather than forbidding prospective relief altogether, it has limited the class of cases in which that relief is proper. The relief remains prospective, and the rule on the application of the new statutes to prospective relief applies. For the same reason, the present case would be decided the same way if the Court were to adopt Justice Scalia's approach. See *Landgraf*, 511 U. S., at 293 (opinion concurring in the judgment).

Application of new section 2254(d) to this case has none of the evils of "retroactivity" that underlie *Landgraf*. The Act does not increase any penalty or liability for past actions. Cf. 511

U. S. at 281-282. It does not deprive anyone of property. Cf. *id.*, at 271. It does not require a person to comply with a new requirement after it is too late to do so. Cf. *ibid*. It does not require that completed actions be redone. Cf. *id.*, at 275, n. 29. It only narrows the category of cases in which persons who have already had their day in court will get another. The reasons underlying the application of procedural, jurisdictional, and prospective relief rules to pending cases fully apply to this case.

IV. The present case illustrates the wisdom of the new statute.

Time and time again, this Court has warned against misuse of the Constitution to micromanage state trials. *Harris* v. *Alabama*, 513 U. S. ___, 130 L. Ed. 2d 1004, 1014, 115 S. Ct. 1031, 1036 (1995); *Spencer* v. *Texas*, 385 U. S. 554, 564 (1967); *Snyder* v. *Massachusetts*, 291 U. S. 97, 105 (1934). Yet the admonition is ignored more than it is heeded.

The rules of evidence, both state and federal, assign to the discretion of the trial judge the task of weighing the probative value of evidence against the danger of unfair prejudice. Fed. Rules Evid. 403; Wis. Stat. § 904.03; *United States* v. *Abel*, 469 U. S. 45, 54 (1984) (unanimous); *State* v. *Lindh*, 468 N. W. 2d 168, 176 (Wis. 1991). If this quintessentially evidentiary question is constitutionalized, however, and if all constitutional questions are reviewed *de novo* on habeas, then the trial judge's decision will not only be second-guessed and third-guessed on appeal, but also fourth-guessed and fifth-guessed in the federal district court and court of appeals.

Such extreme review and re-review may well be appropriate for truly fundamental questions, but fundamental rules are now only a small subset of constitutional rules, and they have been for many years. The fact that a rule is constitutional no longer suffices to compel *de novo* review on habeas. See *Rose* v. *Lundy*, 455 U. S. 509, 544 (1982) (Stevens, J., dissenting); Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 156-157 (1970).

The danger of prejudice in this case was great. If mere allegations of misconduct by a prosecution expert are deemed *per*

se admissible, it will be "open season" for character assassination on them. Such allegations are all too easy to make, and they damage a professional's career even where they are ultimately found to be baseless. Given the preliminary status of the allegations, the steps taken by the Dane County District Attorney to neutralize the conflict, and the unique and irreplaceable position of Dr. Roberts as the only psychiatrist to have interviewed Lindh near the time of the crime, the trial judge's decision seems well within the bounds of discretion. Yet the dissenting judges in the Court of Appeals would decide this question yet again, as the *fifth* court in which it has been argued.

Constitutional or not, this is not the kind of fundamental question that warrants such extended review. Congress has now forbidden it. For this case and for the entire enormous backlog of capital cases, these borderline claims on the ragged edge of constitutional law should simply be denied. Petitioner has already had his day in court. He is not entitled to another.

CONCLUSION

The judgment of the Court of Appeals for the Seventh Circuit should be affirmed.

March, 1997

Respectfully submitted,

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APPENDIX A

Powell Committee § 2259:	Enacted § 2264:
"(a) Whenever a state prisoner under a capital sentence files a petition for habeas corpus relief to which this subchapter applies, the district court shall:	"(a) Whenever a State prisoner under capital sentence files a petition for habeas corpus relief to which this chapter applies, the district court shall only consider a claim or claims that have been raised and decided on the merits in the State courts, unless the failure to raise the claim properly is—
"(1) determine the sufficiency of the evidentiary record for habeas corpus review based on the claims actually presented and litigated in the state courts except when the prisoner can show that the failure to raise or develop a claim in the state courts is (A) the result of state action in violation of the Constitution or laws of the Un[it]ed States; (B) the result of the Supreme Court recognition of a new federal right that is retroactively applicable; or (C) based on a factual predicate that could not have been discovered through the exercise of reasonable diligence in time to present the claim for state post-conviction review; and	"(1) the result of State action in violation of the Constitution or laws of the United States;
"(2) conduct any requested evidentiary hearing necessary to complete the record for habeas corpus review.	"(2) the result of the Supreme Court's recognition of a new Federal right that is made retroactively applicable; or
"(b) Upon the development of a complete evidentiary record, the district court shall rule on the merits of the claims properly before it."	"(3) based on a factual predicate that could not have been discovered through the exercise of due diligence in time to present the claim for State or Federal post-conviction review.
	"(b) Following review subject to subsections (a), (d), and (e) of section 2254, the court shall rule on the claims properly before it."

Powell Committee Comment to Proposed § 2259

"**COMMENT:** Subsection (a) defines the scope of federal review in capital cases to which this subchapter applies. It authorizes the district court to consider only those federal claims actually raised and litigated in the state courts. If the section 2254 petition presents no new claims, the district court will proceed to rule on the merits of the claims properly before it as long as the state evidentiary record and findings of facts are adequate. If they are deficient in any respect recognized under section 2254(d), the district court must complete the evidentiary record before addressing the issues on the merits. To this extent, subsection (a) does not depart from existing law and practice.

"If a petitioner asserts a claim not previously presented to the state courts, the district court can consider the claim only if one of the three exceptions to the general rule listed in subsection (a)(1) is applicable. In that case, the district court must conduct an evidentiary hearing necessary to a full and fair consideration of the claim and in accordance with subsection (b) adjudicate it on the merits only with all other issues presented in the section 2254 petition.

"As far as new or 'unexhausted' claims are concerned, section 2259 represents a change in the exhaustion doctrine as articulated in *Rose* v. *Lundy*, 455 U. S. 509 (1982). Section 2259 bars such claims from consideration unless one of the subsection (a)(1) exceptions is applicable. The prisoner cannot return to state court to exhaust even if he would like to do so. On the other hand, if a subsection (a)(1) exception is applicable, the district court is directed to conduct an evidentiary hearing and to rule on the new claim without first exhausting state remedies as *Rose* v. *Lundy* now requires. Because of the existence of state procedural default rules, exhaustion is futile in the great majority of cases. It serves the state interest of comity in theory, but in practice it results in delay and undermines the state interest in the finality of its criminal convictions. The Committee believes that the States would prefer to see postconviction litigation go forward in capital cases, even if that entails a minor subordination of their interest in comity as it is expressed in the exhaustion doctrine." *Id.*, at 22-23.